



## An Egg-Shaped Bowl: Law, Invention, Technology

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# AN EGG SHAPED BOWL: LAW, INVENTION, TECHNOLOGY

*Eugene McNamee\**

**Abstract.** Heideggerean theory read through Foucault would situate law itself as a form of technology, a framing that subjectifies and which (for Foucault) implies an ethical response. A productive complication is added to this picture by certain new approaches that develop law's anthropological aspects; in this essay the exemplar is the work of Alain Pottage which deals with the regulation of new genetic technologies and which opens up the question of distinctions between 'persons' and 'things'. Pushing the law/anthropology relationship further (staying close to the body and the themes of self-invention/invention of self) reveals potential for re-ordering (counter-invention) using the insights and concepts of Lewis Mumford and Luce Irigaray.

## 1.0 INTRODUCTION

In *The Question Concerning Technology*, Heidegger traced an etymological pathway to re-formulate 'technology' as a mode or way of revealing.<sup>1</sup> In his argument *techne* as a concept in classical Greek related to the idea of gathering together the series of causes that can be refined out in relation to an end product (material cause, formal cause, efficient cause, final cause; the Aristotelian shuffle) in order to reveal the essence of the thing produced.<sup>2</sup> *Techne* was the gathering in order to reveal the essence of. In pre-modern times (again his reference was classical Greece) *techne* had the quality, was a mode of, *poiesis*, the revealing of truth into or as beauty (a sense which is retained in our idea of 'poetry' but which was vastly wider in that time when language had not yet strayed far from the home of Being — think perhaps of 'poetry in motion' and extrapolate to 'poetry' as an apt description of any perfectly achieved endeavour). In Modern times however, where for Heidegger the passage to modern technological consciousness was marked by the early seventeenth century shift (blame Gallileo...) to atomistic, experimental science, the mode of revealing had altered to a challenging forth or enframing of the world as a standing reserve, as a pit of resources.<sup>3</sup> The essence was no longer a gathering to reveal the thingness of thing, the quiddity, the treeness of trees (in one example that he offers) but rather was a gathering to reveal

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\* School of Law, University of Ulster, Northern Ireland. Email: e.mcnamee@ulster.ac.uk. Thanks to Maria Andrews and to the anonymous reviewers of the *AFLJ*.

<sup>1</sup> Heidegger Martin 'The Question Concerning Technology' in Krell David Farrell (ed) *Martin Heidegger: Basic Writings* Routledge London 1978.

<sup>2</sup> The theory of causes is discussed in book 5 of Aristotle's *Metaphysics*, available in numerous editions, including Aristotle *The Metaphysics* Penguin Classics London 1998.

<sup>3</sup> For an account (with a legal twist) of the development of atomistic science see Redondi Pietro *Galileo Heretic* Princeton University Press Princeton 1989.

the potential of the thing for further manipulation and exploitation — the furniture of trees, the tourist potential of landscape, the hydroelectric power of a river, the consumer base in a classroom of students. From that point forward nothing could ever rest easy in itself, as everything fell prey to a viciously circular logic of transformation. Modern technology, in other words, is instrumentally to do with machines but essentially more to do with a relationship to the world that figures the world and everything in it as a site standing ready to be exploited, as something whose function is to be useful. The world stands indebted to humanity which continually and repeatedly claims its' due. Humans, to stretch the point into a contemporary resonance, are the creatures that, feeling the pain of their existence or rather feeling their existence as pain, continually sue the world for wrongful birth. Aside from the obvious dangers of the exhaustion of the world, Heidegger identifies another danger here that he states as follows:

The threat to man does not come in the first instance from the potentially lethal machines and apparatus of technology. The actual threat has already afflicted man in his essence. The rule of enframing threatens man with the possibility that it could be denied to him to enter into a more original revealing and hence to experience the call of a more primal truth.<sup>4</sup>

Here the suggestion is that mankind is trapped into a circular pattern of becoming the creature that stands ready to exploit the world even as the world is reduced to that which stands ready to be exploited. In this cycle, mankind is equally degraded as the world, and in a kind of variant on the Hobbesian 'man is wolf to man' which legitimates and necessitates the Social Contract, man becomes accountant or actuary to man, constantly measuring and evaluating worth, utility, credit and deficit. What is lost is openness to a higher form of life that patterns value on truth and beauty. Instead the world and humankind are ordered within a particular technological register, living under a particular regime of immanent law in the self-realising truth of accountability. Truth, law and value all converge around the notion of utility/usability/economic value. Mankind, rather than embrace the world as gift, claims what it is owed as a form of law; it is the niggardly creditor ever calling for more and more capital, a higher and higher rate of return, less and less tax, all as a form of entitlement, a matter of right.

This Heideggerean analysis provides a grand ideological platform and a lexicon of stirring concepts through which to figure political/conceptual action, and indeed it heavily marks the intellectual politics of the late twentieth century.<sup>5</sup> Certainly the latent ecological strands within such Heideggerean philosophy have passed into common cultural currency to influence counter currents in *Gaia* philosophy and other environmental movements and to produce a form of resistance to a purely exploitative relationship to the natural environment.<sup>6</sup> Likewise the insight that technology may be more fruitfully regarded as an attitude rather than a series of devices came

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<sup>4</sup> Heidegger above note 1 at 333.

<sup>5</sup> The works of Arendt, Foucault and Derrida are all shot through with Heideggerean influence. For analysis, see, for example: Villa Dana *Arendt and Heidegger: the Fate of the Political* Princeton University Press Princeton 1995; Rayner Timothy *Foucault's Heidegger: Philosophy and Transformative Experience* Continuum London 2007; Derrida Jacques *Of Spirit: Heidegger and the Question* University of Chicago Press Chicago 1991.

<sup>6</sup> See for example Voltz Bruce *Inhabiting the Earth: Heidegger, Environmental Ethics and the Metaphysics of Nature* Humanity Books London 1995.

to occupy a central place in certain critiques of contemporary society. It is apparent in the sceptical notion of *techno-science*, that is, the disillusioned casting (or recognition) of science as the endeavour to understand nature always through its aspect of potential transformability, a manoeuvre that effectively negates the distinction between nature and culture.<sup>7</sup> The dyad of techno/science may also be regarded as an alternative rendering of Foucault's 'power/knowledge', which he identified as forming a productive mechanism of a medico-juridical 'regime of truth' (the imperative to be healthy) taking shape as bio-political forms of 'governmentality' (management of actual bodies at the level of population and individual).<sup>8</sup> Such an idea of contemporary regime of truth re-situates law as part of an apparatus, realizing itself in its operations, rather than as part of the sovereign guiding hand.<sup>9</sup> Law itself, in other words, is largely refigured as technology, as an aspect of an overall pattern of enframing and revealing (to revert to the Heideggerean idiom).

If in Heideggerean philosophy there remains the strong sense of impulse towards a radical outside to forms of contemporary consciousness, Foucauldian theory is much more attuned to identifying the specific dynamics that allow such consciousness, in its variant forms, to persist. The political edge arrives with the (at times implicit, at times explicit) attempt to suggest a politics of resistance that refracts or re-orders the patterns of discourse so that 'technologies of the self' are as likely to have a positive as a negative valence, depending on their mobilization within his writings.<sup>10</sup> This essay, relying on this Heideggerean/Foucauldian intellectual line, is concerned with technologies that lie close to the domain of self in what on certain levels seems a more literal way than the Foucauldian, in the sense of technologies the operation of which imply a certain amount of reflection on the condition of being human, yet through an analysis which is related to the Foucauldian. Such technologies as treated here relate to gender identity and to genetic manipulation, and the aim is to stay close to the theme of technological self-invention, although, as will become clear, this self-invention is treated as also a matter of interaction with the physicality of the world rather than limited to either (or both) intellectual self-reflection and physical self-fashioning. The question which animates the investigations is that of whether the Heideggerean/Foucauldian conceptual equipment is adequate to the new times in which we are living, where technology has reached the point of, one might say, through the capacity to radically re-engineer the physical beingness of a person (through surgeries or genetic technology) turning the human being inside out, so that in a certain sense a kind of animality re-emerges, or, putting the same point slightly differently, core animality emerges as a seeming limit point rather than

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<sup>7</sup> For a particularly engaging avowedly feminist take on 'technoscience' see Haraway Donna *Simians, Cyborgs and Women: The Reinvention of Nature* Routledge New York 1991 and *Modest\_Witness@Second\_Millennium.FemaleMan©\_Meets\_OncoMouse*<sup>TM</sup> Routledge New York 1997.

<sup>8</sup> For an introduction to Foucauldian themes and Materials see Rabinow Paul *The Foucault Reader: An Introduction to Foucault's Thought* Penguin London 1991.

<sup>9</sup> See in particular Foucault Michel *The Birth of Biopolitics: Lectures at the College de France 1978–1979* Palgrave Macmillan Basingstoke 2008.

<sup>10</sup> For analysis see Martin Luther, Gutman Huck and Hutton Patrick (eds) *Technologies of the Self: A Seminar with Michel Foucault* University of Massachusetts Press Amherst 1998.

remaining submerged in a notion of having long ago been left behind.<sup>11</sup> In order to explore this point, this essay tries to push the Heideggerean/Foucauldian insight of technology as a pattern of ordering (and as such of immanent law) which catches up the world and humankind generally and in circular fashion. It tries to push the idea forward in time through looking at certain writings about controversial contemporary issues of law and society (genetic technology and embryology) which open up the question of whether we have moved to a different pattern of technological revealing than that portrayed by Heidegger as 'Modern' and whether the circle of world-law-humankind has shifted. In other words, to examine certain evidence that we are indeed technologically postmodern, and to ponder what resources we (that is, we as legal commentators on such controversial issues and interested in the specifics of recognizing relationships to law and legality) might have to encounter the new times. Secondly, it tries to push the idea backwards from Heidegger (and his classical Greek fixation) into alternative readings of the 'essence' of technology as illustrated in the work of the historian of technology (and cultural analyst) Lewis Mumford, once again with the aim and intention to examine ideas of immanent social ordering; the law of laws. This pushing back in time suggests certain points that throw us once again into the present, or at least the much more recent past, and in particular to the unfairly neglected work of Luce Irigaray, in which she attempts to think sexual difference as a form of law beyond the, for her, impoverishing notion of legal equality.

## 2.0 BACK TO THE FUTURE

On April 6<sup>th</sup> 2011 the English *Daily Telegraph*, with blithe disregard for the complexities of sexual identity, pre-historic chronology and factual accuracy (perhaps secure in the knowledge that the subject of their report had died around 5,000 years ago and so actions for breach of privacy or libel were ruled out) ran a story under the headline 'First Homosexual Caveman Found'. The accompanying text unfolded the account of an excavation in the Czech Republic that had uncovered an ancient burial chamber wherein a man had been interred after the fashion of a woman; 'head pointing eastwards and surrounded by domestic jugs'. According to the archeologists leading the dig, the strict funerary practices of the 'Cord Ware People' (a people widely dispersed throughout Northern Europe and so named after their practice of patterning unfired pottery with pieces of cord) made it highly unlikely that this placing of a male corpse after the fashion of a female had been done in error. Much more likely, in their view, was that this particular man had been in some way identified as womanly, perhaps because of a 'different sexual orientation, homosexual or transsexual'. They pointed to the fact that, whereas typically a man would have been expected to be buried with swords, stone axes, flint knives and the like, this body had been buried with the archetypical grave-goods accompaniment and placing for a woman, in particular; 'beneath the feet, an egg-shaped bowl'.

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<sup>11</sup> One alternative theoretical avenue here has been opened by Giorgio Agamben in his works relating to animality forward from his landmark intervention in *Homo Sacer: Sovereign Power and Bare Life* Stanford University Press Stanford 1998. See in particular Agamben Giorgio *The Open: Man and Animal* Stanford University Press Stanford 2002.

As regards the notion of ‘homosexual caveman’ the *Telegraph* headline (in search of a cheap gag amongst the bones and pottery shards) is casually and carelessly reductive of what is more delicately dealt with in the text as the possible discovery of the earliest indication of community-recognised ancient ‘third-gender’ patterns of being; the pattern of interment indicating that the individual’s self-identification while alive (with due caution as to the possible anachronism of ‘identity’) had been respected in their burial. This more subtle rendering of the significance of the find serves to prompt a degree of reflection on the historical trajectory of what today might be termed ‘queer’ issues; that whole field of identity and expression that is defined by a productive complication of reductive sexual categorization into the classical binary of (heterosexual) man and (heterosexual) woman, allied to the second binary opposition of heterosexuality and homosexuality.<sup>12</sup> Since by the time of this burial cave-dwelling (in all but the rarest of sites) had long since passed into oblivion in favour of life in shelters not so far removed from early versions of modern houses, a more accurate headline might have run something like ‘Queer Goings-On in the Copper Age’.<sup>13</sup>

The notion of ‘queer’ is very strongly linked to the notion developed by Foucault of the ‘Technologies of the Self’, that is, to the re-framing of an idea of consistent human beingness not just into an idea of human difference, but into notions of regular patterns of being that implicated the interweaving of practical forms of activity (performance in queer terms) with a sense of one’s own individual self. Here there is the strong idea of ‘making oneself’ that is a matter of disciplining or ordering both the body and the imagination to create a consistent ‘self’. The first volume of *The History of Sexuality*, first published in English in 1977, had the effect of a grand intellectual watershed in notions of sexuality as constructed, and the second two volumes, published in the mid-1980’s, drove home the more detailed considerations of ‘technologies’ and ‘practices’ of self, introducing ‘ethics’ as the notion of reflective attitude in relation to particular forms of behaviour.<sup>14</sup> While Foucault focused his analyses from the Greco-Roman period onwards, the emergence into attention of such characters as the interred (misnamed) ‘homosexual caveman’ opens up questions as to the longer terms of history within which the relationship between self-fashioning and fashioning of the world might fall to be considered. To put this another way, it opens the question of whether Foucault was correct in following Heidegger in locating such an absolute priority for the generation of enduring social meaning in classical Greece, and whether this was not perhaps the result of his fascination with available (classical) textual material; the fairly standard conflation of an idea of history with the idea of writing. Nevertheless, leaving this qualification aside temporarily, the Foucauldian analyses certainly do make more profound the question opened by Heidegger of the relationship between technology as an aspect of technical manipulation of the world, and technology as a form of relationship to the world, *including the physical and imaginative resources of oneself*. This latter framing introduces a

<sup>12</sup> For a seminal text see Sedgwick Eve *Epistemology of the Closet* (2<sup>nd</sup> ed) University of California Press Berkeley 2008.

<sup>13</sup> For an introduction to prehistoric developmental taxonomy and nomenclature see, for example, Pryor Francis *Britain BC* Harper Perennial London 2004.

<sup>14</sup> Foucault Michel *The History of Sexuality Volume 1: The Will to Knowledge* (new ed) Penguin London 1998; *The History of Sexuality Volume 2: The Use of Pleasure* (new ed) Penguin London 1998; *The History of Sexuality Volume 3: The Care of the Self* (new ed) Penguin London 1998.

strong element of circularity in the relationship of self to environment, humanity and the world. In so doing it constitutes another element in the late twentieth century dissolution of the classical distinction between ‘nature’ and ‘culture’, with a specific focus of attention being the implication of ‘man’ in this process of dissolution. Such characteristics as ‘sexuality’ which had emerged in the nineteenth century as seeming carriers of forms of profound truth as to human nature, are revealed in the Foucauldian view as artifacts of a particular ‘regime of truth’, an aspect of specific power relations. After *The History of Sexuality* the concepts sex, gender, sexuality, men, women, emerge from the chrysalis of ‘identity’ and begin to vibrate.

One effect of ‘queer studies’, much of which takes inspiration from Foucault and that characteristically as an academic form finds expression across multiple disciplines (including law) but that is also typified by its ‘troubling’ (as the jargon has it) of the boundaries between the academy and the world beyond — for example through the figuring of gender as an aspect of social performance which opens up the consideration of embodied practice as a form of theory-in-action and thus renders usual academic reflective (classroom, library, study) activity as ineluctably dull and ‘straight’ — has been to put front and centre the question of personal invention, the plasticity of humanity when placed in its own hands.<sup>15</sup> If all such ideas are certainly present in germ in Foucauldian philosophy, the specific flavour of Queer was to embrace philosophy-in-experimental-invention. Although there is a legacy here of dada-ist performance and theorists/artists such as Artaud,<sup>16</sup> contemporarily such personal invention has often been connected with recent technological advances in the performance of ‘gender-alignment’ surgeries. At the extremes, such technological interventions have been attuned to align ‘gender’ to the imagination of the protagonist going under the knife, rather than in line with a normative notion of correct or standard maleness or femaleness. Surgical procedures have been carried out, for example, to implant devices so as to produce human beings who mimic animal forms; whiskers, tails, elongated ears, etc.<sup>17</sup> Often such practices, while esoteric, do not generate legal controversy; for example, human beings who look animalesque are, nonetheless, not treated (legally) as animals. Legal considerations have more often entered in to the equation in the form of adjudications and regulations on the extent to which ‘new’ sexual identities can be fitted into the old sexual categories of ‘man’ and ‘woman’, leading to disputes about the validity of marriages, the propriety of incarceration in this or that gendered facility, the availability of certain amended registration documents (including birth certificates) and so on.<sup>18</sup>

A related field that ties personal invention to technological advance and law is that of genetic technology. Here the technologies have encroached on areas perceived to get underneath

<sup>15</sup> As to the notion of gender performance and trouble generally see Butler Judith *Gender Trouble: Feminism and the Subversion of Identity* Routledge Classics New York 2006. In law generally see, for example, Moran Leslie, Monk Daniel and Beresford Sarah (eds) *Legal Queries* Continuum London 1998 and specifically on queer performance and law see Berlant Lauren and Warner Michel ‘Public Sex’ (1998) 24(2) *Critical Enquiry* 547.

<sup>16</sup> For relevant discussion see Brown Steve and Stenner Paul ‘Artaud and Embodiment’ chapter 5 in Brown and Stenner *Psychology without Foundations: History, Philosophy and Psychosocial Theory* Sage London 2009.

<sup>17</sup> See, for example, Bornstein Kate *My Gender Workbook: How to Become a Real Man, a Real Woman, the Real You, or Something Else Entirely...* Routledge London 1998.

<sup>18</sup> See Moran et al above note 15; and Whittle Stephen *The Transgender Debate: The Crisis Surrounding Gender Identity* South Street Reading 2000.

what suddenly appears as a fairly casual distinction between men and women, to the level of humanity as an aspect of technically manipulable organicity generally, to the level of the ‘book of life’. Technical intervention now takes on the flavour, at least on the level of imagination and rhetoric if not as yet in comprehensive practical terms (although incrementally it is certainly the case) of the re-designing of life at the genetic level, having much higher ambitions than simply minor corrections to already complete organic processes. In order to deal with this new order of profundity, regulation has had to move in part to forms of quasi-law in the shape of ‘ethics’ committees, to forms which rely on prospective decisions on the value of procedures being allowed to go ahead, rather than retrospective decisions as to their legality or not. Law takes on the quality of a second-order observational activity; it is legally sanctionable for the ethical procedures not to have been brought into play, but the actual decision is not legally coded.<sup>19</sup> In this activity there is a conflation of form and function in that law is necessarily looking at itself and its own capacity to intervene or not in the same gesture as it looks at whatever issue lies before it; it has become self-reflective, ethical, rather than purely normative. One might contrast this position to the Foucauldian idea of law as alternatively (and largely alternately) sovereign/juridical or technological/biopolitical (in the sense of either command, or forming part of an apparatus of power relations which function to guide and govern rather than command). In this contemporary arena, there is a strong element of circularity in the law; the analytic elaboration of ethicality as opposed to morality which runs through Foucault’s work and which is used to introduce a certain element of conceptual (and ontological) flexibility through exactly this circularity (morality is what we do, ethics is the self-reflective process that lies behind what we do...) is legally reproduced; law has re-complexified its own operation to become self-reflective, and in this dynamic movement has moved beyond the model of analysis provided by Foucault.

Yet another relevant area here is that of the legal regulation of human fertilization and embryology. Here the issues include those pertinent to the distinction between men and women, or more acutely that between boys and girls in the practice of sex selection of embryos. What is, however, more usually at stake are questions of distinction between the kind of material on which experimentation can be legally conducted and the kind of material on which it cannot. Once again the regime of regulation has gravitated towards the introduction of elements of prospectivity and circularity in the shape of the ‘ethics committee’.<sup>20</sup> The problem with circularity, of course, is that of becoming trapped in the circle, and therefore the issue of how and whether one can get in and get out at appropriate points. Certain theorists have taken on board this dilemma of finding ways in, and finding ways out.

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<sup>19</sup> For an introduction to debates see Brownsword Roger, Cornish WR and Llewelyn Margaret (eds) (1998) 61(5) *Modern Law Review Special Issue Human Genetics and the Law: Regulating a Revolution*. See also Brownsword Roger *Rights, Regulation and the Technological Revolution* Oxford University Press Oxford 2008.

<sup>20</sup> In the UK, the regime of licensing introduced by the *Human Fertilisation and Embryology Act 1990* which set up the Human Fertilisation and Embryology Authority as an executive but non-departmental body essentially creates a tiered structure of ethical committees. The Act has been partially amended by the *Human Fertilisation and Embryology Act 2008*. For the activities and remit of the HFEA see <http://www.hfea.gov.uk/> For an Australian comparison see Allan Sonia ‘Regulatory Design Strategies and Enforcement Approaches for Research Involving Human Embryos and Cloning in Australia and the United Kingdom — Time for a Change?’ (2010) 32(4) *Sydney Law Review* 617.



In each of these two areas mentioned above, that of biotechnology and that of human fertilization, the concatenation of issues has been pithily and accurately rendered down by Alain Pottage into the core issue of problems about the distinction between ‘persons’ and ‘things’. This distinction he figures in legal-anthropological terms.<sup>21</sup> In his introduction to *Law, Anthropology and the Constitution of the Social*, Pottage, in presage of the series of diverse essays to come and in reference to the social and regulatory anxieties provoked by human biotechnology and contemporary embryology, notes that:

In each of these technological areas, persons become indistinguishable from things: gene sequences are at once part of the genetic programme of the person and chemical templates from which drugs are manufactured; embryos are related to their parents by means of the commodifying forms of contract and property, and yet they are *also* persons; depending on the uses to which they are put, the cells of the embryos produced by *in vitro* fertilization might be seen as having either the ‘natural’ developmental potential of the human person or the technical ‘pluripotentiality’ that makes them such a valuable resource for research into gene therapies. In each case, the categorization of an entity as a person or a thing is dependent upon a contingent distinction rather than an embedded division.<sup>22</sup>

Following Pottage’s argument further, it is that a fundamental Western legal form (in both Roman and Common Law traditions) has been a legal distinction between persons and things that seems patterned after nature; legal persons in general are natural persons and to the extent that legal personality exceeds this boundary it does so by extrapolating a seemingly natural capacity to own: to put the matter succinctly, (legal) persons are the things that (can) own things. However, the new science of human manipulability breaks down the seemingly natural boundary between persons and things, and to the extent that the law can hold the line and keep the distinction alive, it reveals itself as a constructive agent, building a distinction that it purports to describe, and revealing the process as precisely that of constructing distinction rather than recognizing (natural) fundamental division. As Pottage dryly points out, ‘now the problem is that humans are *neither* person *nor* thing, or simultaneously person *and* thing, so that the law quite literally *makes* the difference.’<sup>23</sup>

This movement to the point of recognizing persons and things as the product of a continually reproduced pattern of legal distinction (perhaps the foundational pattern of distinction that codes wider society, an argument that Pottage references to Gillian Rose in her work *Dialectic of Nihilism*) reconstructs law itself as a kind of communicative machine.<sup>24</sup> This point relates to Pottage’s principal theoretical touchstone, that of autopoietic/systems theory — the principle references for Pottage here are various works of Niklas Luhmann and Gunther Teubner.<sup>25</sup> While this is the theoretical scheme within which Pottage largely situates himself (in

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<sup>21</sup> For an alternative trajectory through ‘persons’ and ‘things’ with reference to ideas of property see Grbich Judith ‘Language as the Pretty Woman of Law’ in Thornton Margaret (ed) *Romancing the Tomes: Popular Culture, Law and Feminism* Cavendish London 2002 p 131.

<sup>22</sup> Pottage Alain ‘Introduction: The Fabrication of Persons and Things’ in Pottage Alain and Mundy Martha (eds) *Law, Anthropology, and the Constitution of the Social: Making Persons and Things* Cambridge University Press Cambridge 2004 p 1 at 4.

<sup>23</sup> As above at 5.

<sup>24</sup> See Rose Gillian *Dialectic of Nihilism: Post-Structuralism and Law* Blackwell London 1984.

<sup>25</sup> See Luhman Niklas *Law as a Social System* Oxford University Press Oxford 2008; Teubner Gunther (ed) *Autopoietic Law: A New Approach to Law and Society* de Gruyter Berlin 1987.

the sense of accepting its value as a contemporary analytic) it is not one that he considers necessary as a point of departure in order to support his main theme and that which unites the series of essays in the book. This unifying theme is the idea of the movement of law generally towards anthropology, as the traditional pattern of viewing a natural break between persons and things ‘the old agreement’ (as one of the contributors, Bruno Latour, puts it) technologically dissolves. Given that anthropology is based on the study of the construction and maintenance of shared patterns of meaning which constitute people as people and community as community, and given that anthropology is much more practiced therefore in the regarding of seemingly natural divisions or distinctions as being based on shared meaning patterns, then the suggestion is that legal scholars and anthropologists can have a meaningful conversation around contentious and fundamental (and socially generative) ideas, such as the distinction between persons and things and the various manifestations that this distinction takes as it runs through patterns of social life. In particular the suggestion is that legal scholars would find an anthropological input a productive device in trying to think through new legal forms appropriate to contemporary society and issues around technical manipulation of reproductive elements.

As an example, in his own more substantive contribution to the volume, an essay on ‘Our Original Inheritance’ Pottage works through a kind of internal monologue that brings to life his own working through of a legal/anthropological conversation on the notion of ‘genetic inheritance’ (or, as he alternatively phrases it to mimic the French rendering ‘Genetic Patrimony’; this he does in order to emphasise the link to ideas of ownership). What he finds is that concepts that seem essentially anthropological, like genetic patrimony or inheritance, which seem to make some kind of purely scientific and basic claim on the limits of human beingness given the basic ingredients which are passed on from one generation to the next, is in fact modeled on legal notions of inheritance, which in turn historically drew on taxonomic notions of genealogical descent in order to find justification, which would in turn have drawn on basic legal categories of personality. The point is to illustrate that life is and always has been conjured as much as revealed, and law has always been part of this process:

It might be said that law is the original biotechnology. According to one kind of legal anthropology, law is the essential and most enduring technique for the fabrication of human life, the traditional means of recruiting biological processes in the service of a social design. In the case of law, the design is institutional rather than commercial or industrial. The traditional role of Western law was to institute subjectivity. A psychic life that conceived of itself as unbounded, and which had no knowledge of death, time, or alterity, was pressed into defined institutional roles which communicated and inscribed each of these existential structures. In that sense, and by means of a particular aesthetic technique, law made life live.<sup>26</sup>

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<sup>26</sup> Pottage Alain ‘Our Original Inheritance’ in Pottage Alain and Mundy Martha (eds) *Law, Anthropology, and the Constitution of the Social: Making Persons and Things* Cambridge University Press Cambridge 2004 p 249 at 255. The reference to ‘one kind of legal anthropology’ is to the work of Pierre Legendre. For an introduction to Legendre see Pottage Alain ‘The Paternity of Law’ chapter 5 in Douzinas Costas, Goodrich Peter and Hachamovitch Yifat *Politics, Postmodernity and Critical Legal Studies: The Legality of the Contingent* Routledge London 1994.

Linking this point specifically to genetic technologies and their contemporary representations (that bring them figuratively to life in an environment where figuration through ‘writing the book of life’ is the matter at hand):

Performatively, the concept of (human) genetic patrimony is not a device that simply maps a particular item of inheritance on to the distinction between nature and culture; rather it is a device that is designed to (re-)generate that old distinction. Taken at face value, the concept of genetic patrimony implies that the institution or category of inheritance is still in existence and still viable, and more especially that the old co-ordinates of the institution (quite simply, nature and culture) are still recognizable and still embedded in (or *as*) the world. Performatively, however, the pretensions of the concept are much greater than this. The object is to take a particular item (the genome) and deploy it in such a way as to call forth the very co-ordinates that would allow it to be treated as an inheritance. Therefore the effect would not be to subsume a particular item with an existent institution of inheritance, but to conjure the institution into being (once again) around a particularly prestigious item.<sup>27</sup>

So the point is the transmission of institutional life, and that what appears in this area of contemporary social practice to be a decoding of nature itself, and in this a kind of re-institutionalisation of the nature/culture divide, relies on a legal notion of inheritance that is no longer fully operative in law and which was in any case based on a productive circular fiction:

The interesting point is that in the past, what law’s subjects inherited were not discrete objects or funds, but the very institution of inheritance. Fundamentally what was transmitted with each succession was the mode of transmission itself. The performance constituted the role, and hence the institution. It is a tribute to the success of law as a life technology that what ran in the blood, or what ran *as* blood, was a particular kind of legal imperative, retroactively constituted by its implementation.<sup>28</sup>

Pottage further illustrates this point with reference to classical Greek notions of ‘autochthony’ and analogous Roman law provisions, each securing notions of legal inheritance based on a transmission of an idea of being of (in the sense of from) a particular place. At root then, one might say, were roots; the projection and defining of a person in terms of their (mythical) original inheritance, in turn based on their being of the soil of a particular place.

This all provides a tremendous enrichment of the potential critical vocabulary and conceptual armoury (if the martial pun can be permitted) in relation to the intertwining of life, law, technology, experiment and invention, and allows in particular for a sophistication of the nature and operations of law compared to the Foucauldian development on Heidegger’s insights into technology. However, there is still here a priority accorded to the institutionalization of particular social/legal forms in the Greek classical and Roman periods, and the extreme sophistication of the arguments has the somewhat paradoxical effect of narrowing the potential range of interactions between patterns of social form that can be considered; we are left very grandly with law and a sense of being on the inside of a jeweled world of ideas wondering if there is any exit point that might equally enrich. Perhaps the key is time, not in any mystical sense, but

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<sup>27</sup> Pottage above note 22 at 284.

<sup>28</sup> As above at 281.

in the sense of seeking to re-frame by pushing back into pre-history and away from the classical Greek and Roman ideas.

### 3.0 WOMB AND TOMB

Amongst general theorists there are few in the Twentieth century who have come close to Lewis Mumford for the eclecticism of his interests and the breadth of his capacity for synchronization of theme and idea. Most well known for his masterwork *The City in History* his writings also extended to criticism of art and architecture, play-writing, cultural history and a kind of broad cultural anthropology of western social forms of which ‘The City’ in the above mentioned work is a prime example.<sup>29</sup> For Mumford the initial developmental impulse for mankind that opened the path beyond the form of life of the great apes was man’s super-abundance of mental potential and energy. Rejecting a reductive vision of man as defined through a capacity to use tools and thus gradually learn how to wrest control over the world, for Mumford man’s development was as much a feature of calming down as it was of skilling up; man evolved by gradually gaining control over and ordering the riot of sensations emergent in his body from the relationship to the world.<sup>30</sup> In a second inversion of standard developmental evolutionary ideas he foregrounds the role of ritual and repetitive performative practice as a route towards this achievement of self-discipline and into meaningful social interaction, rather than see ritual as an excess that developed out of man’s gradual satisfaction of his everyday needs. As man gained in order he lost in sensation, and this pattern of anti-teleological analysis characterizes Mumford’s account of human evolution; while maintaining distinct direction and an inherent logic it is nonetheless entirely contingent, each new step being a function of the road travelled thus far.

In his developmental account of early human cultures Mumford places great emphasis on the achievement of language (for him contemporary technological accomplishments such as nuclear power are as nothing compared to the achievement in moving from animal sound to complex human language). A second major watershed in human development on which he focuses a great deal of attention is the movement from Paleolithic to Neolithic, from hunter-gatherer society to agriculture based settled village life. Once again his account of the dynamic of this change is intriguing and suggestive:

Early man’s respect for the dead, itself an expression of fascination with his powerful images of daylight fantasy and nightly dream, perhaps had an even greater role than more practical needs in causing him to seek a fixed meeting place and eventually a continuous settlement. Mid the uneasy wanderings of Paleolithic man, the dead were the first to have a permanent dwelling: a cavern, a mound marked by a cairn, a collective barrow. These were landmarks to which the living probably returned at intervals, to commune with or placate the ancestral spirits. Though food gathering and

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<sup>29</sup> Mumford Lewis *The City in History: Its Origins, its Transformations and its Prospects* Harcourt San Diego 1961.

<sup>30</sup> The somewhat sexist language here mimics that of the original text; ‘mankind’, ‘his’ etc. are of course used as generics for humankind except where the text draws specific attention to sexual difference.

hunting do not encourage the permanent occupation of a single site, the dead at least claim that privilege... the city of the dead antedates the city of the living.<sup>31</sup>

The burial chamber is the seed of the village, in turn the town and the city. The beginnings of settled village life was the catalyst for the development of a whole series of technologies which were focused around the ideas of storage and protection, in contrast to the technologies of hunting. For Mumford this marked a shift from masculine to feminine:

Woman's presence made itself felt in every part of the village: not least in its physical structures, with their protective enclosures, whose further symbolic meanings psychoanalysis has tardily brought to light. Security, receptivity, enclosure, nurture — these functions belong to woman; and they take structural expression in every part of the village, in the house and the oven, the byre and the bin, the cistern, the storage pit, the granary, and from there pass on to the city, in the wall and the moat, and all inner spaces, from the atrium to the cloister. House and village, eventually the town itself, are woman writ large. If this seems a wild psychoanalytic conjecture, the ancient Egyptians stand ready to vouch for the identification. In Egyptian hieroglyphics, 'house' or 'town' may stand as symbols for 'mother' as if to confirm the similarity of the individual and the collective nurturing function. In line with this, the more primitive structures — houses, rooms, tombs — are usually round ones: like the original bowl described in Greek myth, which was modeled on Aphrodite's breast.<sup>32</sup>

Although this unabashed focus on the feminine rings as provocative in our own era when notions of equality hold sway (a feature which often has the effect of provoking a general ignoring of the obvious features of sexual difference) the particularly interesting element of Mumford's analysis is the way in which he is able to construct a bridge between anthropology as the study of human nature and technology as the pattern of human interventions into nature. The bridge is that man's first task was to gain control of himself, to fashion himself from the electric raw material of his unformed and wild consciousness. The available techniques were very limited, the capacity to repeat and through this to ritualize. And the available models for technological innovation were largely the elements of his (and notably her) own body:

Many scholars who have no difficulty in recognizing that tools are the mechanical counterfeits of the muscles and limbs of the male body — that the hammer is a fist, the spear a lengthened arm, the pincers as human fingers — seem prudishly inhibited against the notion that a woman's body is also capable of extrapolation. They recoil from the notion that the womb is a protective container and the breast a pitcher of milk: for that reason they fail to give full significance to the appearance of a large variety of containers precisely at the moment when we know from other evidence that woman was beginning to play a more distinctive role as food provider and ruler than she had in earlier foraging and hunting economies. The tool and the utensil, like the sexes themselves, perform complementary functions. One moves, manipulates, assaults; the other remains in place, to hold and protect and preserve.<sup>33</sup>

Technology is thus emergent from the physicality of man and woman, and takes forms which can be distinguished into sub-elements, for example of machine, tool and utensil, all of which may be

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<sup>31</sup> Mumford above note 29 at 7.

<sup>32</sup> As above at 13.

<sup>33</sup> Mumford Lewis *The Myth of the Machine: Technics and Human Development* Secker and Warburg London 1967; see chapter 6 'Fore-Stages of Domestication' at 140.

seen to have been equally vital in the evolutionary development of humankind, and which continue to be vital to the maintenance of the forms of society which currently persist.

This engagement with technology is at a level which attempts to sub-divide it, rather than (as in the Heideggerian tradition) create an over-arching grand analytic or reduce to a simple unity. In this sub-division the idea is explicit that there is an emergent pattern of interaction between human beings, here recognized as explicitly sexed, and the environment. This interaction throws up widely different types of technologies which in turn pattern a kind of sexed world. Moving through the gears fairly quickly we can compare this to the Heideggerian scheme of technology in the sense of (classical) sub-divisions that become embraced and impoverished within a unified single concept of technology in the Modern period. For Heidegger the productive complication of a single idea of 'technology' is into the notion of relationship to the multiplying 'causes', a classical reference, while for Mumford the breakdown is into diverse technologies that may be grouped according to specific social function and that may be coded in terms of male and female, a reference to pre-historical social order. In the contrast what leaps out in the Heideggerian account is the lack of attention to any analysis based on male/female difference in his overall treatment of technology. From Pottage and his attention to the transmission of institutional life through legal forms (and thus the bringing to life of life in particular forms) the link is obvious to the ideas developed in Mumford. In each case what is transmitted is a pattern of transmission, however, the life instituted is in one case connected to proto-Modern legal forms of property, while in the other Mumfordian analysis the connection is to pre-Modern and (potentially) proto-post-Modern legal forms which a) recognize difference and b) are much more embracing of the world as it is, in the sense of much more close to the everyday practices of working in the soil, making from the soil, returning to the soil; the roots already mentioned of the mythicalised Greek and Roman classical forms of autochthony and inheritance, the very ideas referenced in Pottage. The ineluctable drive through the cross-fertilisation of these ideas is towards an investigation of the possibility of instituting different legal forms which would function as forms of transmission but which would recognize (sexual) difference. In order to follow this idea, rather than driving forwards we find ourselves once again turning around to look backwards, but now only to the recent past.

## 4.0 TO BE TWO

Through the late nineteen eighties and early nineties feminist theorisation in one of its strands turned towards an explicit recovery of feminine difference from a broad politics of equality. This was particularly associated with 'continental' or 'French' feminism, and with writers such as Kristeva, Cixous and Irigaray. It was further associated with or marked by a turn away from direct institutional political concerns and towards a political refraction through attention to what seemed on one level more abstract, that is, attention to language and culture, and on another level more immediate, to issues of the specificity of the feminine and of the female body figured through desire rather than through productivity. Of the three writers mentioned above, Luce

Irigaray stands out as having made some attempt to bridge the seeming chasm between ideas of 'equality' and 'singularity' rather than simply leap across it.

In her essay 'Between us, a fabricated world' ('Fra noi, un mondo fabbricato') Irigaray writes as follows:

Saying 'Man', Heidegger wasn't thinking of the masculine gender, or at least he didn't spell this out. Now, what if technology, the mystery of the reign of technology, is explicable in terms of a masculine subjectivity that is unaware of its own nature?

Various motives drive man to privilege technology: a doing outside of himself, a putting in front of himself, an external revealing, a making truth appear through force and ability in something outside of himself. It probably has to do with the relationship that man has with his own creation: he is someone who will never generate in himself and has to rely on making outside himself to differentiate himself from his mother; he must make on the outside while she generates from the inside.<sup>34</sup>

In effect the attempt here is to insert a corrective into the Heideggerean vision, a re-insertion of the specifically feminine.<sup>35</sup> This short excerpt is perhaps misleading however if it seems to suggest an overly simple line of division between the male and the female, and to unlock the complexity of the idea here we should bear in mind that her encounter with Heidegger is designed precisely to provide a corrective rather than to reject the fundamental notions of the power of technology.

Turning back momentarily to Alain Pottage's work on technology discussed above, there is common ground with Irigaray in the sophistication of the notion of 'fabrication' that is at play, and while in Irigaray's work this sophistication floats freely (in the 'mondo fabbricato') Pottage ties it down very succinctly when explaining why he will discuss the 'fabrication' of persons and things:

Indeed the term 'fabrication' is chosen precisely because it suggests modes of action which are lodged in rich, culturally specific, layers of texts, practices, instruments, technical devices, aesthetic forms, stylized gestures, semantic artefacts, and bodily dispositions.<sup>36</sup>

In the movement of his argument Pottage turns towards an interface between law and anthropology to suggest that a previous plausibility and therefore invisibility of law's active drawing of the lines around persons and things is being lost. Technological development throws up instances where the line is blurred, and so law in any attempt to clarify is obviously working hard, rather than following a natural pattern. Law reveals itself as an institutional force in the creation of persons. The connection here to Irigaray is her argument that, given that law is the institutional force that ties down personality, there is much more room for a specific imagination of the feminine within law. Not law as a philosophical encounter with patterns of desire, but law as legislated social norm, as a promoted universality which corresponds to the sexed subjectivity of women and men (and note that when she talks of 'possession' below this carries the same

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<sup>34</sup> Irigaray Luce *Essere Due* Bollati Boringhieri Torino 1994 p 87 (my translation).

<sup>35</sup> For a full-scale encounter with Heidegger by Irigaray see Irigaray Luce *The Forgetting of Air in Martin Heidegger* University of Texas Press Austin 1999.

<sup>36</sup> Pottage as above note 22 at 1.

sophisticated thrust of a convergence of materiality and culture developed by Pottage in his discussions of ownership and inheritance):

The law of persons represents the guardian of subjectivity, enabling it to develop without alienating itself in possession. The law of persons leaves open the possibility of subjectivity's developing without alienation in possession — which anchors it in the past. The law of persons regulates relations between people in which questions of having, of competition for possession, are not an issue; these all too often define the subjectivity of citizens, and as such reduce them to petty masters forever fighting among themselves.<sup>37</sup>

The opacity here in relation to what actually such a sexed law of persons would include or entail is clarified to an extent in another essay 'Practical Teachings — Love — Between Passion and Civility' from the same volume (*I Love to You*) when the issue of sexed rights for women is addressed:

- The right to physical and moral inviolability, that is to a civil identity guaranteed by positive law ...
- The right to voluntary motherhood without Church or state leaders exercising... real power over a woman...
- The right to culture, that is the right to languages, religions, arts and sciences appropriate to female identity
- A preferential and reciprocal right for mother and child(ren), particularly as a guarantee against violence and economic poverty...<sup>38</sup>

On an ungenerous reading such a list does little to provide a workable legal programme and therefore might be considered a fairly redundant exercise — one which, after the fashion of the French feminisms mentioned, has largely been overshadowed by theorization of the potential inventiveness which surrounds human physicality rather than what might be seen as reversion to notions of the basic or the foundational.<sup>39</sup> However, if we accept the line of argument developed in this paper, from Heidegger through Foucault to Pottage, that technology is a form of attitude or mode of approach (rather than simply a list of machines) which implies certain forms of law (Foucault) and which has reached a kind of self-reflective point because, in a kind of irony, technology as device (bio-technology) has challenged fundamental but hitherto largely invisible legal distinctions between persons and things (Pottage) then there is perhaps a need for a certain productive naivete as to forms of law that could address social life on such fundamental levels as that of the distinction between persons and things. Such forms of address, it is suggested, should include the question(s) of the inscription of sexual difference within law; a task no doubt difficult but worth being thought through on a level that has yet to be attempted but towards which

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<sup>37</sup> Irigaray Luce *I Love To You: Sketch of a Possible Felicity in History* Martin Alison (trans) Routledge New York 1996; chapter 4 'Donning a Civil Identity' at 53.

<sup>38</sup> As above at 132.

<sup>39</sup> There are numerous critiques of Irigaray on grounds of her supposed 'reductionism' or 'essentialism'; see for example Cheah Pheng, Grosz Elizabeth 'The Future of Sexual Difference: An Interview with Judith Butler and Drucilla Cornell' (1998) 28(1) *Diacritics* 19 in Cheah Pheng and Grosz Elizabeth (eds) *Irigaray and the Political Future of Sexual Difference* Special Issue (Spring 1998) 28(1) *Diacritics*.



Irigaray has provided a route which winds through caves and courtrooms.<sup>40</sup> Technology here in the Mumfordian sense, the careful distinction between machine, utensil and tool and the investigation of historical coding and sexual/biological extrapolation is also of potential help. If culture is accepted as technologically and materially sexed in a much more radical sense than simply that men did this and women did that, then there is plenty of room for re-thinking of multiple potential cultural interventions including into legal forms. The key, or the clue, going back to our pre-historic burial site and taking with us both Irigaray and Mumford, is the egg-shaped bowl: the egg as bowl, the bowl as egg. ●

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<sup>40</sup> For her discussion of Plato's cave as womb see 'Plato's *Hystera*' in Irigaray Luce *Speculum of the Other Woman* Cornell University Press Ithaca New York 1985. See also 'The necessity for sexuate rights' and 'How to define sexuate rights' in Whitford Margaret (ed) *The Irigaray Reader* Basil Blackwell Oxford 1991. See further Porter Ewan 'Equality in the Law and Irigaray's Different Universals' in Richardson Janice and Sandland Ralph (eds) *Feminist Perspectives on Law and Theory* Cavendish London 2000; Russell Yvette 'Luce Irigaray: An Ode to (A-)Luce' in Dillet Benoit, Mackenzie Iain and Porter Robert (eds) *The Edinburgh Companion to Post-Structuralism* Edinburgh University Press Edinburgh 2012.